80-483

No. 80-

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ST. JOE MINERALS CORPORATION,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September 25, 1980

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QUESTIONS PRESENTED

1. Whether in establishing primary national ambient air quality standards under Section 109(b)(1) of the Clean Air Act, the Administrator of the Environmental Protection Agency must consider the impact of a standard on the "public . . . welfare and the productive capacity of [the Nation's] population" in determining the "adequate margin of safety" to be imposed beyond the limit which is "requisite to protect the public health."

2. Whether the Administrator must separately delineate the limit which is "requisite to protect the public health" from the additional allowance to be made for "an adequate margin of safety" to assure his rational consideration of the differing factors relevant to each determination and to provide an adequate basis for judicial review.*

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* In addition to St. Joe Minerals Corporation, the Lead Industries Association, Inc. (LIA) was a petitioner in the Court of Appeals. LIA has filed a separate petition for a writ of certiorari in this Court. Respondent in the Court of Appeals was the Environmental Protection Agency (EPA). The Bunker Hill Company was an intervenor. The Natural Resources Defense Council, Inc. and the Air Resources Board of the State of California participated as *amici curiae*.

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OPINIONS BELOW

The opinion and judgment of the Court of Appeals for the District of Columbia Circuit is not yet officially reported and is set forth in the separately bound Appendix to this petition as Appendix A. The Environmental Protection Agency's (EPA) final regulation and statement of basis and purpose are published at 43 Fed. Reg. 46246 (1978), and are also set forth in the separately bound Appendix as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

The pertinent part of Section 109 of the Clean Air Act (Act) provides (42 U.S.C. §7409(b)(1) (Supp. I 1977)):

> National primary ambient air quality standards . . . shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. . . .

Section 101(b)(1) of the Act provides (42 U.S.C. §7401(b)(1) (Supp. I 1977)):

> The purposes of this subchapter are—
>
> (1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

STATEMENT

St. Joe Minerals Corporation (St. Joe) seeks review of a National Ambient Air Quality Standard (air quality standard) promulgated by the Administrator of the Environmental Protection Agency (Administrator) under the purported authority of Section 109(b) of the Clean Air Act (42 U.S.C. §7409(b)) (Act) which limits public exposure to lead in the ambient air to 1.5 micrograms of lead per cubic meter of air (ug Pb/m^3). The Administrator's actions are premised upon his findings that significantly elevated levels of lead in the blood will result in adverse health effects that can lead to health problems, including anemia and lead intoxication.

Ambient air, at which the standard is directed, is a relatively minor source of lead exposure and, thus, a

relatively insignificant contributor to elevated blood lead levels. The Court of Appeals found that it ranks third behind diet and other forms of direct oral ingestion as a source of lead exposure. App. A, pps. 4a-5a. Moreover, even as to airborne lead, EPA data show that stationary sources, such as St. Joe's lead smelting plant at Herculaneum, Missouri, account for only approximately five per cent (5%) of lead emitted into the air, and that even those emissions were comprised primarily of non-respirable particles.[1] J.A.[2] 2805. Ninety per cent (90%) of lead in ambient air is from gasoline combustion, a source which already has been regulated by the Administrator. *See Amoco Oil Co.* v. *EPA,* 501 F.2d 722 (D.C. Cir. 1974); *Ethyl Corp.* v. *EPA,* 541 F.2d 1 (D.C. Cir. 1976) (*en banc*), *cert. denied,* 426 U.S. 941.

The Administrator was compelled to list lead as a pollutant under Section 108 of the Act (42 U.S.C. §7408) and thereafter to undertake the regulatory proceeding culminating in the air quality standard at issue here, by a court order entered in *Natural Resources Defense Council, Inc.* v. *Train,* 411 F. Supp. 864 (S.D.N.Y.), *aff'd,* 545 F.2d 320 (2d Cir. 1976). Relying upon a series of assumptions and determinations, he first proposed a 1.5 ug Pb/m^3 standard as the level

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[1] Ninety-nine per cent (99%) of the lead particulates emitted from St. Joe's Herculaneum plant are non-respirable and cannot be absorbed into the blood stream through the lungs. App. A, p. 70a. The Administrator nevertheless speculated, without any record support, that these particulates might be ingested orally or through weathering might in time become respirable. App. A, p. 72a.

[2] "J.A." refers to the Joint Appendix filed in the Court of Appeals.

necessary to prevent a certain "subclinical"[3] change in blood known as erythrocyte protoporphyrin elevation (EP elevation) in children between the ages of 1 and 5 years. App. A, pps. 16a-21a. He found this age group to be the most sensitive to elevated blood lead levels. App. A, p. 17a.

After he received and considered comments on the proposed standard, the Administrator acknowledged that the very early stages of EP elevation, which the proposal sought to prevent, might not have health significance (App. A, p. 22a), and that blood lead levels could be twice as high as he had initially proposed (App. A, p. 23a). In the end, however, the Administrator adopted the same air standard as originally proposed,[4] by applying more conservative assumptions at certain points in his recalculation.[5] App. A, pps. 23a-24a. These more conservative assumptions were justified by the Administrator, in part, as necessary to

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[3] A "subclinical" effect or "biological response" is essentially a deviation from the physical norm that is not clinically detectable, *i.e.*, which cannot be demonstrated by the classic techniques of physical examination but rather can be detected only through special testing. *See, e.g.*, J.A. 1334. Healthy persons continually experience such deviations with no adverse health effects. App. A, pps. 54a-55a.

[4] The standard was slightly modified to improve the validity of monitoring data by enlarging the averaging period for the standard from a monthly to a quarterly basis. App. A, p. 24a.

[5] The following table, which sets forth the assumptions made by the Administrator, demonstrates the impact that even very slight changes can have upon these assumptions:

	EPA ASSUMPTION	IF CHANGED TO	RESULTING NAAQS
1.	(No Change)	----------	1.5
2.	Maximum safe blood lead level = 30 ug Pb/dl (App. B, p. 128a)	Maximum safe blood lead level = 35 ug Pb/dl	3.0

allow an adequate margin of safety. *Id.* However, the Administrator neither attempted to identify the extent to which this resulting margin of safety exceeded the level necessary to protect against observed adverse health effects, nor sought to consider factors other than health risks in setting the margin or margins of safety allowed.

St. Joe, operator of the Nation's largest lead smelter, petitioned the Court of Appeals to set aside the air standard because the cost of an effort to comply utilizing the technology identified by EPA — $52 million in capital costs and $13 million in increased annual costs — threatens the continued economic viability of its Herculaneum plant. J.A. 2241. The Administrator himself concluded that "some primary and secondary lead and copper smelters may be severely strained

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3.	Protect 99.5% of sensitive population (App. B, p. 135a)	Protect 99.0% of sensitive population	2.0
4.	Standard deviation for lead in blood = 1.3 (App. B, p. 136a)	Standard deviation for lead in blood = 1.25	2.5
5.	Non-air sources of lead in blood = 12 ug Pb/dl (42 Fed. Reg. 63080-63081)	Non-air sources of lead in blood = 10 ug Pb/dl	2.5
6.	Air lead/blood lead ratio = 1:2 (42 Fed. Reg. 63081)	Air lead/blood lead ratio = 1:1	3.0
7.	----------	Change All	11.0

Although each of the above changes would not have more than a slight effect upon the final standard, their cumulative impact is to increase the standard to 11.0 ug Pb/m^3—*a more than sevenfold increase*.

economically in achieving emission reductions that may be required in implementing the proposed air quality standard." App. B, p. 157a. Even with the staggering financial outlays the standard calls for, however, any effort on the part of primary lead smelters to comply will fail because the technology does not exist to achieve the degree of reduced emissions required.[6]

St. Joe contended, *inter alia,* that the Administrator should have identified the margin of safety his final standard provided beyond the limit required to protect against observed health effects and should have considered a variety of factors in setting this margin, including the severity of the health effects to be prevented, the degree to which scientific knowledge is unable to predict the level necessary to protect against adverse health effects, the technological feasibility of compliance, and the economic impact of the safety margin. Brief for Petitioner St. Joe Minerals Corporation at 20-25.

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[6] St. Joe and other primary lead smelter operators have already installed air pollution controls which reduce lead levels in their smoke stack emissions. In fact, the compliance control factor for primary lead smelter stack emissions, as determined by EPA, is 98.2%. J.A. 2841, 2857. The principal remaining source of lead emissions from primary smelters such as St. Joe's Herculaneum Smelter is so-called "fugitive emissions," those emissions which could not reasonably pass through a stack, chimney, vent or other functionally equivalent opening. As EPA itself acknowledges (App. B, p. 157a.) control of fugitive lead emissions to levels required by the EPA lead standard is not feasible through installation of available technology. J.A. 2229-33. Moreover, even if fugitive lead smelter emissions could be eliminated entirely, the background levels of lead in the vicinity of primary lead smelters prevent continuous and consistent compliance with the lead standard at a level of 1.5 ug/m³. J.A. 2231, 2248, 2255-6. Thus, although St. Joe and the other primary lead producers have already achieved very high levels of emissions control, compliance with the final EPA lead standard by primary lead smelters is not technologically possible.

The Court of Appeals misconceived St. Joe's contentions by characterizing St. Joe's position as a claim that the statutory direction to allow an "adequate margin of safety" required the Administrator to consider economic and technological feasibility in setting a primary air quality standard without apparent recognition of the health protective limit/margin of safety distinction. App. A, p. 31a. The Court thus proceeded, without itself differentiating between the health protective limit and the added margin of safety, to dismiss St. Joe's contentions as contrary to the legislative history that technological and economic feasibility should not be considered in establishing the health protective limit. App. A, pps. 31a-38a.

REASONS FOR GRANTING THE WRIT

This is the Court's first opportunity to consider the proper application of the allowance for a "margin of safety" under the Clean Air Act Amendments of 1970. The case presents important questions as to the extent to which the regulation of the nation's ambient air to protect the public from adverse health effects should accommodate other societal needs as well, such as the impact of a primary air quality standard on the nation's economy. In light of legislative history indicating that Section 109 was intended to force the development of new technology, St. Joe does not question the propriety of setting such standards at a level that protects the public from *known* adverse effects even though achievement of the standard may be at present economically and technologically infeasible. These important feasibility factors, however, should be considered together with the severity and the certainty of the more speculative health risks to be guarded against, by the

Administrator's addition of an "adequate margin of safety" beyond the health protective limit, in his determination of what that margin should be.[7]

1. The Court of Appeals' decision that economic and technological feasibility may not be considered in determining the margin of safety is not sound. The legislative history, upon which it relied, limits the Administrator's consideration to health effects in identifying the maximum level of air pollution at which the public is protected from *known* adverse health effects (health protective limit), the necessary first step in the formulation of a primary ambient air quality standard under Section 109(b)(1). *Cf. Industrial Union Dep't, AFL-CIO* v. *American Petroleum Institute,* _____ U.S. _____, 65 L.Ed 2d 1010, 1035-37. The margin of safety, on the other hand, must merely provide a "reasonable degree of protection . . . against hazards which research has not yet identified."[8] Neither the

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[7] To permit the Administrator to speculate as to theoretical health risks, without regard to the concrete harm to the public welfare that flows from unduly stringent standards and without guidance as to "where on the continuum of relative safety he should draw his line," as the Court of Appeals decision permits, is a "sweeping delegation of legislative power" that raises serious Constitutional questions. *See, Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 539; *Panama Refining Co.* v. *Ryan,* 293 U.S. 388. *See also Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.* _____ U.S. _____, 65 L.Ed. 2d 1010, 1037 (Plurality opinion), 1054-55 (Rehnquist J. concurring in the judgment). The Court need not reach this issue here, however, as the text demonstrates, because the Court of Appeals erred in its construction of the standards to be applied under the Act in setting an appropriate margin of safety.

[8] S. Rep. No. 91-1196, 91st Cong., 2d Sess. 10 (1970) (hereafter "S. Rep."), The Environmental Policy Division of the Congressional Research Service of the Library of Congress, *A Legislative History of the Clean Air Amendments of 1970,* at 410 (1974) (hereafter "1970 *Legis. Hist.*").

statute nor its legislative history warrant a similar limitation on the factors that the Administrator should consider in determining an "adequate margin of safety," beyond the health protective limit to protect against theoretically possible health effects at still lower levels of exposure.[9] The consideration of economic and technological feasibility factors in setting the appropriate margin of safety is not inconsistent with expressions of Congressional intent that such factors not be considered in setting the health protective level. These considerations enter into the standard-setting process only *after*

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[9] To the contrary, the legislative history reveals that fulfillment of the Act's objectives necessitates attention to economic and feasibility considerations. As early as 1967, in enacting the first Air Quality Act (Pub. L. 90-148), Congress evidenced an intention that the development of air quality standards "be influenced not only by a concern for the protection of health or welfare, but also by economic, social and technological consideration." S. Rep. No. 90-403, 90th Cong., 1st Sess. 28 (1967); *See also, id.* at 10-11. Then, in rewriting the Act in 1970, Congress reaffirmed that its guiding principles were still "the test of *reasonableness* and *feasibleness*." 1970 *Legis. Hist., supra*, note 8, at 111 (statement of Rep. Staggers) (emphasis added). *See also* 1970 *Legis. Hist., supra,* note 8, at 808 (remarks of Rep. Springer).

Finally, in amending the Act in 1977, Congress emphasized again that its purpose was to "insure the protection of the public health and the environment . . . while *at the same time considering the energy and economic needs of this Nation.*" H. R. Rep. No. 95-294, 95th Cong., 1st Sess. 112 (1977) (hereafter "H.R. Rep."), The Environmental Policy Division of the Congressional Research Service of the Library of Congress, *A Legislative History of the Clean Air Act Amendments of 1977,* at 2501-02 (1978) (hereafter "1977 *Legis. Hist.*") (emphasis added). *See also, id.* at 367 (remarks of Sen. Stafford); *id.* at 369 (remarks of Sen. Stevens); *cf.* H.R. Rep., *supra,* at 61, 1977 *Legis. Hist., supra,* at 2528 ("[A] healthful environment, energy conservation, and a sound economy are interrelated factors bearing on the quality of life of the Nation.")

the health protective level has been identified, and thus, do not compromise the public health.

The Court of Appeals thus erred in ignoring the broader objectives of the Act — which expressly include, in addition to health, the promotion of the public "welfare and the productive capacity of [the Nation's] population" (Section 101(b)(1), 42 U.S.C. §7401(b) (1)) — when it held that economic and technological feasibility are not factors that must be weighed in the promulgation of a primary air quality standard.[10]

The need to consider these additional factors in establishing a margin of safety pursuant to Section 109(b)(1) is supported by key passages in its legislative history which make clear that primary air quality standards were not intended to eliminate all *de minimis* or as yet undetected potential health risks.[11] This construction is also consistent with the Administrator's concessions in an analogous context that air quality standards

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[10] Section 101 (b)(1) of the Act, the "purposes" section, is an explicit statement of statutory intent which must be considered in determining whether economic and technological feasibility and other non-health related factors are relevant to margins of safety determinations. *See FTC* v. *Fred Meyer Inc.*, 390 U.S. 341, 349; *American Trucking Assns. Inc.* v. *Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 409-10; *Association of American Railroads* v. *Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977); *Lubrizol Corp.* v. *EPA*, 562 F.2d 807, 815-16 n. 20 (D.C. Cir. 1977); *Lehigh & New England Ry. Co.* v. *ICC*, 540 F.2d 71, 79 (3d Cir. 1976), *cert. denied*, 429 U.S. 1061.

[11] Congress rejected the argument that ambient air quality standards should be set at "zero or background levels" on the grounds that "this no-risk philosophy ignores all economic and social consequences and is impractical." H.R. Rep., *supra*, note 9, at 127, 1977 *Legis. Hist., supra*, note 9, at 2594. *Accord, Industrial Union Dep't, AFL-CIO* v. *American Petroleum Institute, supra*, _____ U.S. at _____, 65 L.Ed 2d at 1034-35 (plurality op.).

were not intended to precipitate the "closure" of important industries.[12] Finally, it is consistent with the Administrator's own practice of weighing cost considerations in setting hazardous air emission standards under Section 112 of the Act, which require an "ample margin of safety" as opposed to simply an "adequate margin."[13]

The "technology forcing" purpose of the Act's sponsors is fully satisfied by exclusive consideration of health in the Administrator's initial determination of the health protective limit. The extension of this narrow focus to the "margin of safety" element of an air quality standard is not only without legal justification, but also is likely to be counter-productive even in terms of the health objectives of the Act because, as the Act itself recognizes, industry's resources to control pollution are limited.[14]

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[12] *See, e.g.*, 44 Fed. Reg. 58660 (1979) (carcinogens) ("Congress did not contemplate closure of the nation's basic industries, or even widespread industry closures."); 40 Fed. Reg. 59534 (1975) (vinyl chloride).

[13] *See, e.g.* , 44 Fed. Reg. 58661 (1979) (carcinogens) ("The Administrator also believes, however, that he may consider other social and economic factors in determining whether an ample margin of safety is provided by a given control level."); 41 Fed. Reg. 46562 (1976) (vinyl chloride); 40 Fed. Reg. 59534 (1975) (vinyl chloride).

[14] The need to construe specific statutory provisions so as to promote broad Congressional objectives was recognized by Justice Powell in *Industrial Union, supra.* According to Justice Powell, consideration of economic factors in setting toxic pollutant standards under the Occupational Safety & Health Act is essential to insure that industry resources are allocated effectively. *Industrial Union Dep't., AFL-CIO* v. *American Petroleum Institute,* _____ U.S. _____, 65 L.Ed. 2d 1010, 1052 (Powell, J., concurring). Justice Powell viewed as irrational a statutory interpretation requiring industry resources to be expended to reduce certain risks without regard to economic considerations, while other risks that could be reduced in a cost-effective fashion remain unregulated.

2. Given the need to consider different factors in making health protective limit and margin of safety determinations, under well-established principles of administrative law, the Administrator was required not only to consider but also to articulate clearly his separate consideration of the appropriate factors relevant to each.[15] Such a delineation is necessary to assure that each determination is made in a rational manner, with due consideration of the different factors applicable to each, and to assure that the courts are able to discharge their review function properly. This is particularly true in the circumstances of this proceeding where the final standard adopted, with equal logic, could have been at least seven times less stringent merely by making slightly different "assumptions." *See* fn. 5, *supra.* As this Court has aptly observed:

> Expert discretion is the lifeblood of the administrative process, but "unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion." (citation omitted) *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167.

This does not mean, as the Court of Appeals construed St. Joe's position (App. A, p. 31a), that the Administrator is required to observe a rigid two-step

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[15] *See, e.g., Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420; *Environmental Defense Fund* v. *Ruckelshaus*, 439 F.2d 584, 596-98 (D.C. Cir. 1971); *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 400, 402 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921; *Appalachian Power Co.* v. *EPA*, 477 F.2d 495, 506-07 (4th Cir. 1973); *Ethyl Corp.* v. *EPA*, 541 F.2d 1, 33-37 (D.C. Cir. 1976), *cert. denied* 426 U.S. 941; *Dry Colors Mfrs. Assoc.* v. *Department of Labor*, 486 F.2d 98, 105-06 (3d Cir. 1973).

methodology in arriving at a primary air quality standard. It means only that, regardless of the methodology used, his statement of basis and purpose must show his separate consideration of the health protective limit and the allowance beyond that limit for a margin of safety in a manner that clearly sets forth his basis for each determination.

3. The exclusion of economic and technological feasibility in setting the margin of safety element of an air quality standard threatens serious disruption to the Nation's economy. The Administrator concedes, for example, that the standard at issue here may severely strain domestic primary and secondary lead smelters (App. B, p. 157a), which by themselves constitute an important segment of the economy. There are, in addition, a number of other air quality standards affecting equally important domestic industries presently at various stages of regulatory and judicial consideration. Ambient standards presently exist for four substances other than lead: sulfur dioxide, nitrogen dioxide, particulate matter, and photochemical oxidants (ozone). These standards affect the operations of virtually every industry in the country. The Administrator is now reevaluating, by statutory directive, the ambient standards for sulfur dioxide and particulates and is considering the establishment of a new "short-term" standard for nitrogen oxides. In addition, a revised ambient standard for ozone is now under review in the District of Columbia Circuit (*American Petroleum Institute, et al.* v. *Costle*, C. A. No. 79-1104 and consolidated cases).

Thus the appellate court's ruling, and the excessively stringent air quality standards which will be promulgated in reliance thereon, will serve to impede domestic industry's ability to compete in domestic and

foreign markets, to lessen competition within industries by forcing some firms out of business, and even, possibly, to force some industries out of existence altogether, with the result that existing unemployment, inflation, and balance of trade problems will be exacerbated without any commensurate benefit to the public health. This Court's construction of the factors to be considered by the Administrator in setting ambient air standards would prevent this unwarranted economic harm.

4. A definitive resolution of the issues presented at this time, in light of the number of pending and likely future proceedings, will provide necessary guidance as to the factors to be considered in those proceedings. Substantial administrative and judicial resources would be conserved by an early resolution of the questions presented here. Moreover, venue to review Section 109 standards is vested by Section 307(b)(1) of the Clean Air Act exclusively in the Court of Appeals for the District of Columbia Circuit (42 U.S.C. §7607(b)(1) (Supp. I 1977), and there is consequently no reason to await further development in the other circuits of the issues presented.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER

In its brief in opposition to St. Joe Minerals Corporation's (St. Joe) petition for a writ of certiorari, Respondent Environmental Protection Agency (EPA) urges this Court to deny the petition because, in EPA's view, the Court of Appeals was correct in upholding EPA's promulgation under the Clean Air Act of the national primary ambient air standard for lead. In its attempts to justify those portions of the decision below that address the Administrator's margin of safety methodology, EPA makes, and perhaps could not avoid making, arguments which are fundamentally

irreconcilable. EPA's inability to devise a consistent theory to support the decision below underscores the need for this Court to consider the timely and important issues raised by St. Joe regarding the scope of the Administrator's authority to regulate the nation's ambient air without regard for competing societal needs.

1. Respondent EPA raises contradictory legal arguments both of which are based upon the failure of Section 109 of the Clean Air Act (42 U.S.C. § 7409 (Supp. II)) to set forth those factors which must be considered by EPA in determining an "adequate margin of safety" (i.e., the extent to which primary air quality standards should be made more stringent than the level of protection required to protect against *known* health risks). In doing so it becomes caught on the horns of a dilemma of its own creation.

The Agency thus argues, at one point, that the Act's failure to state expressly that economic and technological feasibility are factors to be considered by the Administrator in making margin of safety determinations totally precludes their consideration in that process.[1] Yet, at another point, EPA argues that this very same failure of Congress to identify relevant factors in Section 109 does not amount to an unconstitutional delegation of legislative power because "the Administrator has interpreted Section 109 to provide further criteria that constrain him in choosing an adequate margin of safety . . . ."[2]

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[1] Brief for the Environmental Protection Agency in Opposition (EPA Opposition) at 15, 17.

[2] *Id.* at 17-18, n. 20. EPA goes on to identify the following as among the factors to be considered by the Administrator in mak-

It cannot be both ways. Either EPA can look beyond Section 109 for relevant factors to be applied in its margin of safety determinations or it cannot. If it can, then it is not true that the failure of Section 109 to articulate factors precludes their consideration and certainly among those that must be considered are the public "welfare" and "productive capacity" objectives of the Act, clearly stated in Section 101 (42 U.S.C. § 7401 (Supp. II)), which necessarily include economic and technological feasibility. If EPA cannot look beyond the sparse language of Section 109, then the Administrator is indeed making margin of safety determinations without necessary Congressional guidance.

EPA's attempt to fashion a middle ground to avoid its own dilemma, by selectively excluding economic and technological feasibility factors from its "adequate margin of safety" determinations, can only be characterized as arbitrary and unfounded. Beyond its inconsistency with the already noted broad statement of the Act's societal objectives expressed in Section 101, this tortured position belies statements in the legislative history to the effect that fulfillment of the Act's objectives necessitates attention to economic and tech-

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ing the margin of safety determination: "the severity and reversibility of the health effects, the types of evidence and degree of uncertainty concerning known or suspected health effects, and the size of the population risk." *Id.*

Significantly, St. Joe has consistently argued that economic and technological feasibility were only two among many factors to be considered. As the Court of Appeals acknowledged, "[o]ther factors that should, in St. Joe's view, be considered are the severity of the associated health effects and the adequacy of the scientific base for determination of the health protective threshold level." App. A. at 31a. *See* St. Joe Minerals Corporation Petition for a Writ of Certiorari (Petition), at 6.

nological feasibility considerations. *E.g.*, Petition, at 9 & n.9 (and citations appearing therein). It is further ironically at odds with the Administrator's own well-established position that these very same factors are to be considered in issuing air emission standards for hazardous pollutants under the similar but more stringent "ample [not merely adequate] margin of safety" provision of Section 112 of the Act. *E.g.*, *id.* at 11 & n.13 (and citations appearing therein). *Compare* Section 112 of the Clean Air Act, 42 U.S.C. § 7412 (Supp. II) *with* Section 109 of the Clean Air Act, 42 U.S.C. § 7409 (Supp. II).

2. EPA frankly concedes that the Administrator did not make two "separate and distinct" decisions in determining the pollution level required to protect the public health and the adequate margin of safety to be added beyond that level; it contends, however, that he did not have to make such a delineation between the two. EPA Opposition, at 17. It persists in this position despite its additional concession that the Administrator is required to consider factors in his margin of safety determinations that do not enter into his determination of health protective levels.[3]

Where distinct elements of a standard require the consideration of different factors, it is plain that separate consideration of each element is necessary to assure adherence to the statutory scheme. Moreover, under well established principles of administrative law, this separate consideration must be clearly articulated to enable reviewing courts to perform their function

[3] "[T]he administrator has interpreted Section 109 to provide further criteria that constrain him in choosing an adequate margin of safety . . . ." EPA Opposition, at 17-18 n.20.

of determining whether the Administrator's decisions have a rational basis.

CONCLUSION

For the reasons stated herein, as well as those stated in the original petition, it is respectfully submitted that St. Joe's petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 80-483

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ST. JOE MINERALS CORPORATION,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICI CURIAE ALABAMA POWER CO., *ET AL.* IN SUPPORT OF PETITIONER

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October 24, 1980

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QUESTION PRESENTED

Whether in establishing primary national ambient air quality standards under Section 109(b)(1) of the Clean Air Act, the Administrator of the Environmental Protection Agency must consider the impact of a standard on the "public . . . welfare and the productive capacity of [the Nation's] population" in determining the "adequate margin of safety" to be imposed beyond the limit which is "requisite to protect the public health."

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ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICI CURIAE
ALABAMA POWER COMPANY
APPALACHIAN POWER COMPANY
ARIZONA PUBLIC SERVICE COMPANY
BALTIMORE GAS AND ELECTRIC COMPANY
BOSTON EDISON COMPANY
CAROLINA POWER & LIGHT COMPANY
CENTRAL AND SOUTH WEST CORPORATION
CENTRAL POWER AND LIGHT COMPANY
PUBLIC SERVICE COMPANY OF OKLAHOMA
SOUTHWESTERN ELECTRIC POWER COMPANY
WEST TEXAS UTILITIES COMPANY
CENTRAL HUDSON GAS & ELECTRIC CORPORATION
CENTRAL ILLINOIS LIGHT COMPANY
CENTRAL ILLINOIS PUBLIC SERVICE COMPANY
CENTRAL MAINE POWER COMPANY

THE CINCINNATI GAS & ELECTRIC COMPANY
COLUMBUS AND SOUTHERN OHIO
ELECTRIC COMPANY
COMMONWEALTH EDISON COMPANY
CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC.
CONSUMERS POWER COMPANY
THE DAYTON POWER AND LIGHT COMPANY
DELMARVA POWER & LIGHT COMPANY
THE DETROIT EDISON COMPANY
DUKE POWER COMPANY
FLORIDA POWER CORPORATION
FLORIDA POWER & LIGHT COMPANY
GEORGIA POWER COMPANY
GULF POWER COMPANY
GULF STATES UTILITIES COMPANY
HOUSTON LIGHTING & POWER COMPANY
ILLINOIS POWER COMPANY
INDIANA & MICHIGAN ELECTRIC COMPANY
INDIANAPOLIS POWER & LIGHT COMPANY
IOWA-ILLINOIS GAS AND ELECTRIC COMPANY
IOWA POWER AND LIGHT COMPANY
IOWA PUBLIC SERVICE COMPANY
KANSAS CITY POWER & LIGHT COMPANY
KENTUCKY POWER COMPANY
KENTUCKY UTILITIES COMPANY
MADISON GAS AND ELECTRIC COMPANY
MIDDLE SOUTH SERVICES, INC.
ARKANSAS-MISSOURI POWER COMPANY
ARKANSAS POWER & LIGHT COMPANY
LOUISIANA POWER & LIGHT COMPANY
MISSISSIPPI POWER & LIGHT COMPANY
NEW ORLEANS PUBLIC SERVICE, INC.
MINNESOTA POWER
MISSISSIPPI POWER COMPANY
MONONGAHELA POWER COMPANY
NEVADA POWER COMPANY
NEW ENGLAND POWER COMPANY
NEW YORK STATE ELECTRIC & GAS CORPORATION
NIAGARA MOHAWK POWER CORPORATION

NORTHEAST UTILITIES SERVICE COMPANY
THE CONNECTICUT LIGHT AND POWER COMPANY
THE HARTFORD ELECTRIC LIGHT COMPANY
HOLYOKE WATER POWER COMPANY
WESTERN MASSACHUSETTS ELECTRIC COMPANY
NORTHERN INDIANA PUBLIC SERVICE COMPANY
NORTHERN STATES POWER COMPANY
OHIO EDISON COMPANY
PENNSYLVANIA POWER COMPANY
OHIO POWER COMPANY
OHIO VALLEY ELECTRIC CORPORATION
OKLAHOMA GAS AND ELECTRIC COMPANY
PACIFIC GAS AND ELECTRIC COMPANY
PACIFIC POWER & LIGHT COMPANY
PENNSYLVANIA POWER & LIGHT COMPANY
PORTLAND GENERAL ELECTRIC COMPANY
THE POTOMAC EDISON COMPANY
POTOMAC ELECTRIC POWER COMPANY
PUBLIC SERVICE COMPANY OF INDIANA, INC.
PUBLIC SERVICE ELECTRIC AND GAS COMPANY
ROCHESTER GAS AND ELECTRIC CORPORATION
SALT RIVER PROJECT
SAN DIEGO GAS & ELECTRIC COMPANY
SOUTHERN CALIFORNIA EDISON COMPANY
TAMPA ELECTRIC COMPANY
TEXAS UTILITIES GENERATING COMPANY
TOLEDO EDISON COMPANY
TUCSON ELECTRIC POWER COMPANY
UNION ELECTRIC COMPANY
VIRGINIA ELECTRIC AND POWER COMPANY
WEST PENN POWER COMPANY
WISCONSIN ELECTRIC POWER COMPANY
WISCONSIN POWER AND LIGHT COMPANY
WISCONSIN PUBLIC SERVICE CORPORATION
EDISON ELECTRIC INSTITUTE
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

In compliance with this Court's Rule 36, Alabama Power Company, *et al.* ("Electric Utilities") have obtained the written consents of counsel for the parties to file this brief as *amici curiae.* Copies of the consents have been filed with the Clerk.

INTEREST OF AMICI CURIAE

Alabama Power Company and the other 86 individual electric utilities which join in this amici brief generate most of the electricity produced in the United States. Amicus Edison Electric Institute is the trade association of investor-owned electric utilities. Amicus National Rural Electric Cooperative Association represents the interests of rural electric cooperatives throughout the United States. This brief is submitted in support of the petition for certiorari filed by St. Joe Minerals Corporation on September 25, 1980.[1]

Electric Utilities operate, or represent operators of, fossil fuel-fired electric generating plants that are subject to regulation under the Clean Air Act ("the Act").[2] As a group, Electric Utilities have collectively participated in all major rulemakings and litigation under the Act affecting the electric utility industry.

Electric Utilities' participation in these proceedings has frequently been prompted by a concern that the provisions of the Act be interpreted and implemented in accordance with its fundamental purposes. To this end, Electric Utilities have consistently advocated that, to the fullest extent possible, regulatory decisions under the Act

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[1] St. Joe Minerals Corporation v. Environmental Protection Agency, *et al.*, Petition for Certiorari, No. 80-483 (U.S., filed September 25, 1980) (hereafter "St. Joe Petition").

[2] 42 U.S.C. §§ 7401 *et seq.* (Supp. II 1978). For convenience, all references will be to the section numbers of the Act rather than the United States Code; references to both appear in the Table of Citations.

reflect a balance of competing considerations. Underlying this theme of balancing is the presumption that, unless specifically prohibited from doing so, the Environmental Protection Agency ("EPA" or "the Agency") must at least *consider* competing factors before making such decisions.

Nowhere in the Act is consideration of these competing factors more important than in developing national primary ambient air quality standards under section 109. These national standards define the maximum permissible concentrations of airborne pollutants necessary to protect the public health from adverse effects with "*an adequate margin of safety.*" [3] This "margin of safety" requirement, therefore, determines the stringency of EPA-promulgated primary standards.

Under section 110 of the Act, these ambient standards are translated into direct regulatory controls. Specific emission limitations are prescribed by the states (or EPA, if the states default) in regulatory programs known as state implementation plans. The more stringent the ambient standards, the more costly and burdensome the emission control requirements established under the section 110 state implementation plans. Concomitantly, the more stringent the standards, the greater the restrictions on new economic growth.[4] Criminal and civil sanctions

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[3] Clean Air Act § 109(b)(1) (emphasis added).

[4] The level of the air quality standard determines whether industrial facilities will be able to attain the standard, and if not, what steps must be taken to attain the standard. A finding of non-attainment means, at a minimum, that emissions from existing sources will be prohibited until the state or EPA imposes additional control requirements or restrictions on production at existing sources. *See* Clean Air Act §§ 171-173.

In attainment areas, which are subject to the "prevention of significant deterioration" ("PSD") requirements, ambient standards impose a "ceiling" on pollution which can curtail new growth. Clean Air Act § 163. In these "clean air" areas, the PSD provisions

are provided for any violation of these emission requirements implementing ambient standards.[5]

In the case of Electric Utilities, the costs of these controls are ultimately passed through to consumers and industrial users of electricity in the form of higher rates. Under the scheme of the Act, the time at which the impact of these costs is evaluated is critical. This Court's decision in *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976), established that claims of technological and economic feasibility must be disregarded by the Administrator in deciding whether to approve a state implementation plan. Economic and technological feasibility may be considered by state agencies responsible for formulation of implementation plans, *if there are alternative control strategies that will attain the standard.*[6] However, if there are no alternatives, *the states must impose whatever controls are needed to achieve the primary standards even though compliance may be uneconomic or infeasible.* Accordingly, if economic and other factors are not considered by EPA when it selects the margin of safety for a primary ambient standard, there may be no opportunity later to have these factors influence the requirements that individual sources must meet.

In holding that economic and technological feasibility may play no role in the development of margins of safety for primary ambient standards, the District of Columbia Circuit misinterpreted section 109 and distorted the balance Congress sought to promote in the Act. This ruling will have a significant and immediate impact on the electric utility and other industries.

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of the Act prohibit new growth that would cause the ambient ceiling or the PSD "increments" to be exceeded. Thus, the more stringent the ambient standard, the lower the growth rate in those clean air areas where the ambient ceiling is the governing constraint.

[5] Clean Air Act § 113(b).

[6] Union Electric Co. v. EPA, 427 U.S. 246, 266 (1976); Train v. NRDC, 421 U.S. 60, 79 (1975).

As required by section 109(a)(1) of the Act, existing ambient standards for sulfur dioxide, particulates, and nitrogen oxides are presently under review by the Administrator.[7] A decision by EPA on proposed revisions to these standards is scheduled for mid-1981.[8] In addition, the Administrator is required by the Act to establish a new "short-term" standard for nitrogen dioxide unless he finds such a standard is not needed to protect the public health.[9] EPA began developing this standard shortly after passage of the 1977 Amendments, and a proposal is expected in 1981. For the past three years, Electric Utilities have been engaged in a review of information developed by EPA for these future section 109 rulemaking proceedings and have submitted, and are continuing to develop, health effects data and information on the social, economic and other consequences of achieving alternative ambient standards.

Standards for sulfur oxides, particulate matter and nitrogen oxides affect the operation of every fossil fuel-fired power plant and industrial facility in the country. Should revisions to these standards occur in the face of a judicial injunction against consideration of the economic and social consequences of ambient standards-setting, serious disruption to the economy in general, and to the electric utility industry in particular, may result.

Ambient standards set without regard to economic and technological feasibility may require Electric Utilities to curtail the operation of existing generating plants or even shut them down entirely. Planned conversions from oil and natural gas to coal may have to be abandoned. New coal-fired plants necessary to meet increased demand for electrical service or to reduce the Nation's dependence on foreign oil may never be built. These restric-

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[7] These standards are set forth at 40 C.F.R. Part 50 (1979).

[8] EPA's earlier schedule called for completion of this review by late-1980. *See* 45 Fed. Reg. 44108 (1980).

[9] Clean Air Act § 109(c).

tions affecting the production of electricity would endanger not only the already precarious financial health of the electric utility industry,[10] but also the continued growth and expansion of all sectors of the economy on which hopes for reduced unemployment now rest.

STATEMENT OF THE CASE

Section 109 of the Act directs the Administrator to establish national primary ambient air quality standards at the level required to protect the public health with "an adequate margin of safety." [11] In order to fulfill its responsibilities under this section, EPA must first identify the level at which a pollutant causes adverse effects upon the public health. Such effects are identifiable at the point which they have been "observed" or "proved." [12] After the level of observed adverse effects has been

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[10] *See* PUBLIC UTILITIES FORTNIGHTLY, Vol. 105, No. 113 at 109, June 19, 1980.

[11] Clean Air Act § 109(b)(1).

[12] *See* H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 112 (1977) (hereafter "H.R. Rep."), The Environmental Policy Division of the Congressional Research Service of the Library of Congress, A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977 (hereafter "1977 LEGIS. HIST."), at 2579; The Environmental Policy Division of the Congressional Research Service of the Library of Congress, A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970 (hereafter "1970 LEGIS. HIST."), at 1185 (testimony of Dr. John T. Middleton, Commissioner, National Air Pollution Administration, Department of Health, Education and Welfare) (hereafter "Middleton testimony"). It is important to note that the public health is to be ascertained collectively, not by reference to each individual member of the population. In other words, the fact that a pollutant has an adverse effect on a particularly sensitive individual does not mean that the pollutant is adversely affecting the *public* health. S. Rep. No. 91-1196, 91st Cong., 2d Sess. 10 (1970) (hereafter "S. Rep."), 1970 LEGIS. HIST., *supra* at 410.

identified, the "margin of safety" requirement of section 109 comes into play.

The traditional function of a margin of safety is to provide an added degree of protection beyond what is necessary to avoid a known hazardous condition. *See EDF v. EPA*, 598 F.2d 62, 81 (D.C. Cir. 1978). Consistent with the traditional use of the term, Congress included the margin of safety language in section 109 to protect the public "against hazards which research has not yet identified." [13] In other words, the "margin of safety" requirement provides protection against *possible* adverse effects which may have been reasonably *hypothesized* but not yet proven. Thus, once a level of known adverse effects upon the public health is identified, EPA will use "margin of safety" determinations under section 109 to set standards *below* that proven level.[14]

Acting pursuant to this directive, the Administrator promulgated a final rule setting primary and secondary ambient air quality standards for lead at 1.5 micrograms per cubic meter of air.[15] Electric Utilities did not participate in rulemaking proceedings leading to promulgation of this rule because ambient standards for lead do not substantially affect their interests. The final rule, however, rested in large part upon the Administrator's interpretation of the "margin of safety" language of sec-

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[13] S. Rep., *supra* note 12, at 10, 1970 LEGIS. HIST., *supra* note 12, at 410.

[14] H.R. Rep., *supra* note 12, at 112, 1977 LEGIS. HIST., *supra* note 12, at 2579; 1970 LEGIS. HIST., *supra* note 12, at 1185 (Middleton testimony). Dr. Middleton's testimony recognized that the "margin of safety" requirement meant that standards will be set at a point "less than the minimum observed effect level." 1970 LEGIS. HIST., *supra* note 12, at 1185.

[15] 43 Fed. Reg. 46246 (1978). *See* St. Joe Petition, App. B.

tion 109, and the significance of that interpretation far transcends the specific context of lead ambient standards.

Specifically, the Administrator refused to consider economic and technological feasibility in determining the adequacy of the margin of safety incorporated into the primary ambient air quality standard for lead. In sustaining the validity of the final rule, the District of Columbia Circuit upheld this interpretation, holding that the Administrator is neither required *nor allowed* to consider economic and technological feasibility in determining the appropriate margin of safety to be incorporated in ambient standards.[16]

REASONS FOR GRANTING THE WRIT

Electric Utilities urge this Court to grant the petition for certiorari filed by St. Joe Minerals Corporation because the lower court's interpretation of section 109 renders that provision unconstitutional, is inconsistent with the fundamental purposes of the Act, and can significantly and adversely affect the Nation's economy and the public interest.

The urgent need for this Court to review and correct this faulty interpretation of section 109 is made even more compelling because the Clean Air Act provides that petitions for review of ambient standards may be filed only in the District of Columbia Circuit.[17] The existence of this exclusive venue provision ensures that the "margin of safety" issue decided by the Court of Appeals in this case will never be presented for resolution in other forums. Accordingly, review by this Court affords the only opportunity to correct a District of Columbia Circuit decision

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[16] St. Joe Petition, App. A at 32a-33a, 33a n.37. All references to the lower court's opinion are to Appendix A to the St. Joe Petition.

[17] Clean Air Act § 307(b)(1).

that will have profound and pervasive economic and social consequences if left undisturbed.

I. The Lower Court Interpreted the "Margin of Safety" Language of Section 109 to be a Standardless Delegation of Legislative Authority

Under the Constitution, executive agencies may exercise quasi-legislative powers pursuant to an act of Congress so long as the act establishes standards to govern the exercise of the agency's discretion. In other words, under our constitutional scheme, when Congress enacts a statute which requires an agency to exercise discretion, Congress must identify factors to guide that discretion. Without such guidance, a statute would have the effect of delegating legislative powers that are reserved by the Constitution to Congress. Action taken under color of a standardless statute would not be executive but legislative. Thus, without congressional standards, a statute, and actions taken pursuant to it, violates the separation of powers doctrine.[18]

The Court below ignored this fundamental constitutional principle in interpreting section 109 of the Act. The District of Columbia Circuit's opinion does not identify any factors that must be considered by EPA in making "margin of safety" determinations, nor does it describe how EPA's discretion is to be exercised in determining those margins of safety. The only constraint on the Administrator's discretion imposed by the court below is a negative one: he cannot consider the social and economic consequences of his actions. Thus, according to the District of Columbia Circuit, so long as the Administrator *ignores* these factors, he may do as he wishes in determining the stringency of ambient standards.

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[18] *See* Industrial Union Dep't, A.F.L.-C.I.O. v. American Petroleum Institute, 100 S.Ct. 2844, 2866 (1980) (plurality op.); *id.* at 2880 (Rehnquist, J., concurring); Schechter Poultry Corp. v. United States, 295 U.S. 495, 539 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

By interpreting section 109 as an "open-ended grant," [19] the lower court has conferred upon the Administrator unlimited discretion to set ambient standards anywhere on the "continuum of relative safety" [20] that he concludes provides an "adequate" margin of safety. Under the lower court's interpretation of section 109, therefore, future primary ambient standards will be based upon purely legislative judgments that cannot be tested against any statutory standard which identifies the factors to be considered in deciding how much protection is "adequate" protection. As a result, the Administrator's "margin of safety" judgments under section 109 will, from industry's standpoint, be wholly insulated from judicial review.[21] Review of the District of Columbia Circuit's decision by this Court is essential to avoid unconstitutional exercises of legislative authority by the Administrator and to ensure that his future actions are subjected to judicial scrutiny.

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[19] Industrial Union Dep't, AFL-CIO v. American Petroleum Institute, 100 S.Ct. 2844, 2866 (1980) (plurality op).

[20] *Id.* at 2881 (Rehnquist, J., concurring).

[21] The primary function of judicial review is to ascertain whether the agency engaged in reasoned decision-making. Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285-86 (1974); Public Media Center v. FCC, 587 F.2d 1322, 1332 (D.C. Cir. 1978); Appalachian Power Co. v. Train, 545 F.2d 1351, 1367 (4th Cir. 1976); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 402 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 991 (1974). Under the decisions of this Court, reasoned decision-making requires consideration of relevant factors. *See* FCC v. Nat'l Citizens Comm. for Broadcasting, 436 U.S. 775, 803 (1978); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). *Accord*, Seatrain Int'l v. FMC, 598 F.2d 289, 292 (D.C. Cir. 1979); Home Box Office, Inc. v. FCC, 567 F.2d 9, 35-36 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); American Paper Institute v. Train, 543 F.2d 328, 338 (D.C. Cir.), *cert. dismissed*, 429 U.S. 967 (1976). Therefore, if there are no relevant factors, there can be no judicial review.

II. The Decision Below Is Inconsistent With the Purposes of the Act

The fundamental objective of the Act is to protect the public health in a manner which is consistent with economic and social interests. This objective is reflected in the legislative history of the Act [22] and is made explicit in its statement of general purposes.[23] The decision of the court below prohibits the Administrator from considering economic and social interests in determining how far to go below the level of known adverse effects in setting ambient standards. By this prohibition, the Administrator will be precluded from exercising his discretion under section 109 in a manner which assures that the Act's fundamental objective will be realized. The court below erred in compelling such a result.

In framing certain provisions of the Act, Congress itself chose between health and other interests and restricted the exercise of the Administrator's discretion to consideration of health factors alone. Thus, section 109 requires the Administrator to consider only health data in determining whether an ambient standard will protect the public health against known adverse effects. Text at 8 *supra*.

In other provisions of the Act, Congress gave the Administrator greater discretion to balance competing factors, but nevertheless limited that discretion by requiring that he consider only certain enumerated factors. Thus, in section 111, the Administrator is directed to establish new source performance standards on the basis of his consideration of three factors: cost, energy, and any non-air quality health and environmental impacts.[24]

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[22] *See* St. Joe Petition at 9 n.9.

[23] Clean Air Act § 101(b)(1). *See* text at 15-17 *infra*.

[24] Clean Air Act § 111(a)(1)(A)(ii). Once factors are enumerated, an agency may lack discretion to consider additional factors. In Union Electric v. EPA, 427 U.S. 246 (1976), this Court held that

Finally, in still other provisions of the Act, Congress did not specify the factors to be considered by the Administrator. In other words, in these provisions, Congress *did not restrict the Agency's consideration of factors.* Where factors are not enumerated, the Administrator has the responsibility to consider *all factors relevant to achieving the overall objectives of the Act as stated in its purposes section and legislative history.*[25] The "margin of safety" language in section 109 is an example of such a provision which does not contain an enumeration of specific factors.

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section 110(a)(2) of the Act, which set forth eight criteria to be satisfied by state implementation plans, did not authorize the Administrator to reject such plans on grounds of technological or economic feasibility. The Court's reasoning was based upon language of section 110(a)(2) which provided that the Administrator "shall approve" proposed state plans if the eight criteria were satisfied. In light of the specificity of this mandatory language, the Court analyzed the Administrator's authority to reject a plan on economic or technological grounds *solely* in reference to the eight criteria set forth in the statute, none of which permitted consideration of such factors. In Hercules, Inc. v. EPA, 598 F.2d 91 (D.C. Cir. 1978), the District of Columbia Circuit reached a similar conclusion based on analysis of a statute that required EPA to take into account six factors in proposing toxics standards under the Federal Water Pollution Control Amendments of 1972, Pub. L. 92-500, 86 Stat. 816, 33 U.S.C. § 1317(a) (1976), *as amended*, 33 U.S.C. § 1317(a) (Supp. I 1977). The dispositive element of the District of Columbia Circuit's analysis in *Hercules* was the "clear statutory wording" of section 307 which expressed "the congressional selection of factors. . . ." 598 F.2d at 112. Placing controlling weight on the explicit congressional selection of some factors and not others, the *Hercules* court found the meaning of the statute to be clear in not requiring consideration of economic and technological feasibility. *Id.*

[25] *See* Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980). In *Whirlpool*, Justice Stewart, writing for a unanimous Court, analyzed the validity of an agency's regulation by examining its conformance with the "fundamental objective" of the Occupational Safety and Health Act. *Id.* at 11. The regulations authorized an employee to refuse to perform assigned tasks which caused "a reasonable appre-

Had the court below looked to the purposes section of the Act, as it should have in interpreting the "margin of safety" requirement, it would have found that social, economic, and technological factors are all relevant to a decision on how much protection is "adequate" protection under section 109. It would also have avoided the serious constitutional problems posed by its failure to identify *any* factors relevant to "margin of safety" determinations. *See* text at 11-12 *supra*; *see also Industrial Union*, 100 S.Ct. at 2866.

Section 101(b)(1) of the Act states that the purpose of the Act is "to protect and enhance the quality of the Nation's air resources *so as to promote* the *public health* and *welfare* and the *productive capacity* of its population." Clean Air Act § 101(b)(1) (emphasis added). In

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hension of death or serious injury coupled with a reasonable belief that no less drastic alternative is available." *Id.* at 3-4, *citing* 29 C.F.R. § 1977.12 (footnote omitted). In upholding the validity of this regulation, the *Whirlpool* Court embraced an analysis that should have been applied by the lower court in interpreting § 109 of the Clean Air Act. First the Court determined that the regulation furthered the general purpose of the Occupational Safety and Health Act as set forth in its preamble. *Id.* at 13. *See* 29 U.S.C. § 651(b) (1976). Then the Court found that the regulation rationally complemented the overall remedial orientation of the legislation. 445 U.S. at 13. Finally, the Court refused to infer from the legislative history a congressional intent to preclude such a regulation. *Id.* at 13-21.

Previously the lower court had itself illustrated the overriding importance of the purposes section of the Clean Air Act by ruling that section 101(b)(1) imposed upon the Administrator the obligation to establish a regulatory program that was not mentioned in the operative provisions of the Act. *See* Sierra Club v. EPA, 540 F.2d 1114 (D.C. Cir. 1976), *vacated sub nom.* Montana Power Co. v. EPA, 434 U.S. 809 (1977); Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C.), *aff'd per curiam*, 4 E.R.C. 1815 (D.C. Cir. 1972), *aff'd by an equally divided Court, sub nom.* Fri v. Sierra Club, 412 U.S. 541 (1973). Here Electric Utilities urge that the purposes section be used in a more traditional sense—to define the contours of general language in the Act's operative provisions.

other words, the purposes section contemplates that actions taken to protect and enhance air quality promote each of the three objectives of the Act (public health, welfare, *and* productive capacity) in a manner that ensures that no one of them is exalted over or sacrificed to the other.

Framing agency action to accommodate three different objectives calls for balancing. Accordingly, in determining the appropriate margin of safety, the Administrator must consider and balance all factors relevant to the health, welfare and productive capacity of the public. Therefore, since economic and technological factors influence, among other things, whether a particular level of control promotes the productive capacity of the population,[26] these factors must be considered by the Administrator in determining the adequacy of the margin of safety incorporated into ambient standards.[27]

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[26] The Administrator has long recognized the importance of economic and other factors to fulfillment of the Act's objectives set forth in § 101(b)(1). Thus, in proposing the PSD regulatory program implementing § 101 (*see* note 25 *supra*), the Administrator observed that the Agency cannot, and should not, decide on a regulatory approach without "*full consideration of its economic and social implications.*" 38 Fed. Reg. 18986 (1973) (emphasis added).

[27] Contrary to the lower court's understanding, this interpretation of § 109 does not permit the Administrator to establish a primary standard above the level required to protect the public health against adverse effects. Only health data may be considered in determining this level. Text at 8-9 *supra*. Economic and other factors are only relevant to establishing margins of safety. These margins determine *how far below the level of known harm* the standard will be set. In this regard, it should be emphasized that consideration of economic and other factors in setting the margin of safety may influence whether the health and welfare objectives of the Act are fulfilled. For example, if the safety margin is established without regard to economic and technological feasibility, shut-

In summary, since factors governing the exercise of EPA's discretion in setting a margin of safety are not enumerated in section 109, implementation of this provision must be guided by the Act's overall objective—an objective that requires the Administrator to seek a balance among competing interests. The court below held that the Administrator is precluded from considering factors that are plainly relevant to striking such a balance. Unless this Court exercises its discretionary jurisdiction to review this case, national ambient standards will continue to be established without regard to their social or economic consequences—indeed, without regard to whether they will even produce a *net* benefit to the public health.[28]

III. The Decision Below Will Have a Pervasive Impact

The lower court's decision disregards the need to pursue protection of the public health on innumerable fronts, with finite resources. As one member of this Court recently recognized in another context,[29] a profligate commitment of money and technology to guard against one set of risks would ensure inadequate means to cope with other hazards. Effective allocation of resources depends on identifying where the greatest protection is available per dollar spent. Without consideration of the unavoidable relationship between the costs of goods produced and the capacity of the public to purchase such goods, stringent margins of safety designed to protect against *hypothetical risks* may have the effect of denying to the poor and those on fixed incomes products such as elec-

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down of basic industries and limitations on the supply of essential products such as energy for heating and air conditioning can result. The health risks created by such curtailments may be far greater than the health risks posed by slightly higher pollution levels.

[28] *Id.*

[29] *See* Industrial Union Dep't., AFL-CIO v. American Petroleum Institute, 100 S.Ct. 2844, 2878 (1980) (Powell, J., concurring).

tricity that are essential to a healthy environment. As a result, the lower court's decision may spawn regulation that produces only theoretical benefits for society while causing it concrete harm.[30]

Recently this Court has exhibited an awareness of the need for it to resolve questions of this nature in the context of the Occupational Safety and Health Act (OSHA).[31] While the Clean Air Act and Occupational Safety and Health Act both provide for health-related standards-setting, their structure and language are dissimilar.[32] Moreover, the pervasive reach of ambient standards under the Clean Air Act suggests that resolution of the question presented in St. Joe's Petition for Certiorari has transcendent importance to the public at large and the economy as a whole. Therefore, a compelling need exists for the Court to supplement its resolution of cost-benefit issues under the Occupational Safety and Health Act by deciding the Clean Air Act questions set forth in St. Joe's petition.

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[30] In *Union Electric*, Justice Powell recognized that "the shutdown of an urban area's electrical service could have an even more serious impact on the health of the public than that created by a decline in ambient air quality." 427 U.S. at 272 (Powell, J., concurring).

[31] *See* 100 S.Ct. 3054 (1980), granting review of two certiorari petitions from the decision in American Iron and Steel Institute v. OSHA, 577 F.2d 825 (3d Cir. 1978); 49 U.S.L.W. 3208-09 (October 7, 1980), granting review of two certiorari petitions from the decision in AFL-CIO v. Marshall, 617 F.2d 636 (D.C. Cir. 1979).

[32] The two cases accepted for review involve interpretation of section 6(b)(5) of OSHA which contains an explicit reference to feasibility. 29 U.S.C. § 655(b)(5) (1976). It is the absence of such a specific reference in section 109 of the Clean Air Act that has given rise to this litigation.

CONCLUSION

For the reasons stated, the petition for certiorari filed by St. Joe Minerals Corporation should be granted.

Respectfully submitted,

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